3-102 FILED
JUL 11 1973
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 73-102

JAMES ARTHUR WILLIS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS E. JOYCE
428 Brotherhood Building
Kansas City, Kansas 66101
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved:

- 26 U.S.C. 6806 3
- 26 U.S.C. 5121(a) 3, 5
- 26 U.S.C. 5691(a) 3, 5
- 18 U.S.C. 371 4
- 18 U.S.C. 4208(a)(2) 5
- 26 Code of Federal Regulations 194.189 4

Statement of the Case 4

Reasons for Allowing Writ 7

Testimony of Pearlis Williams 10

Testimony of James Gaunce 13

Testimony of Alfred Lee, Jr. 14

Conclusion 15

Index to Appendix

Opinion of Court of Appeals A1

Petition for Rehearing A4

Motion to Quash Search Warrant, etc. A14

Amendment to Motion to Quash Search Warrant, etc. A15

Docket Entry of November 11, 1971 ..... A16

Docket Entry of March 30, 1972 ..... A17

Case Cited

Hill v. *Philpott*, 445 F.2d 144, certiorari denied Dec. 14, 1971, 404 U.S. 991, 92 S.Ct. 533 7

In the Supreme Court of the United States

No. .....

JAMES ARTHUR WILLIS,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this cause May 21, 1973, and the judgment overruling the petition for rehearing entered June 14, 1973.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is not to be published, and was entered May 21, 1973. A petition for rehearing was filed by petitioner and

overruled June 14, 1973. The opinion of the Court is shown in the Appendix at page A1, and the judgment and order of the Court overruling the petition for rehearing is shown in the Appendix at page A14.

JURISDICTION

The judgment of the Court of Appeals was entered June 14th and the order of the Court denying the petition for rehearing was entered June 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) and 28 U.S.C., Section 2101.

QUESTIONS PRESENTED

The Circuit Court of Appeals erred:

1. In holding that the motion to quash the search warrant for the return of property seized thereunder, and to suppress the use of the property as evidence filed November 5, 1971, as amended November 9, 1971, was based on the 4th Amendment to the Constitution of the United States. This part of the Court's opinion is clearly erroneous for the motion as amended clearly shows in Ground 9 thereof that the motion was based on both the 4th and 5th Amendments to the Constitution of the United States. The motion is printed in the Appendix at pages A15-A16.

2. In holding that the relation between the 4th and 5th Amendments to the Constitution of the United States was raised for the first time on appeal for the reason that the motion to quash the search warrant shows it was based on a violation of petitioner's 4th and 5th Amendment rights.

3. In holding that the requirement of 26 U.S.C. 6806 as amended in 1968 (P.L. 90-618, Section 204), which requires the special tax stamp for the privilege of conducting the business of a retail dealer in liquor, be conspicuously placed in tax-payer's establishment or place of business, denoting payment of the special tax required by 26 U.S.C. 5121 for the requirements of 26 U.S.C. 6806 incriminate defendant as a witness against himself under the 5th Amendment to the Constitution of the United States and, therefore, the statute requiring posting in a conspicuous place of said stamp is unconstitutional.

4. In sustaining the order of the Court in overruling the motion of petitioner for judgment of acquittal under Rule 29 of the Rules of Criminal Procedure at the close of the government's evidence and at the close of all the evidence, and renewed in petitioner's motion for new trial.

STATUTES INVOLVED

26 U.S.C. 5121(a) (P.L. 85-859, Title II, September, 1958), assessing a special tax against retail liquor dealers of $54.00 a year, payment of which is evidenced by a stamp.

26 U.S.C. 5691(a), prescribing a penalty for willful failure to pay the special tax required by 26 U.S.C. 5121(a) of a fine of not more than $5,000.00 or imprisonment of not more than two years, or both, for each offense.

26 U.S.C. 6806 (P.L. 89-44, Title VI, June 21, 1965), requiring every person engaged in any business, avocation or employment as a retail dealer in liquor to place and keep conspicuous in his establishment and place of business the stamp denoting payment of the special tax imposed by 26 U.S.C. 5121(a).

18 U.S.C. 371 prohibits two or more persons to conspire to commit an offense against the United States and to do an act to effect the object of a conspiracy. This statute provides a fine of not more than $5,000.00 or imprisonment of not more than five years, or both.

Code of Federal Regulations, Title 26, Section 194.189, which provides as follows:

> "Certain persons may sell liquor as agents or employees of others, or receive and transmit orders therefor to a dealer, without being considered liquor or beer dealers on account of such activities; they are as follows - - -
>
> (c) Employees who merely sell liquors on behalf of their employers."

STATEMENT OF THE CASE

Petitioner was charged in an indictment of three counts returned by a Grand Jury in the United States District Court for the District of Kansas, February 17, 1972. The first count charged that beginning on or after July 1, 1971, and continuing until on or after October 30, 1971, in the District of Kansas, petitioner, together with Sarah Frances Ramey and John Edward Sanders did willfully and knowingly combine, conspire, confederate and agree each with the other and with unknown persons to commit an offense against the United States, that is, to violate Section 5691(a) of Title 26, U.S.C., together with certain overt acts. The indictment is contained in the Record on Appeal.

Count two of the indictment charged that between the same dates set forth in count one, petitioner and Sarah

Frances Ramey carried on the business of a retail dealer in liquor at "The Casa Blanca Club", in Kansas City, Kansas, and willfully failed to pay the special tax required by Title 26 U.S.C., Section 5121(a), in violation of 26 U.S.C., Section 5691(a).

Count three charged that between the same dates as alleged in counts one and two, that petitioner, Sarah Frances Ramey and John Edward Sanders willfully carried on the business of a retail dealer in liquor at "The Swingers Club", in Kansas City, Kansas, and willfully failed to pay the special tax required by 26 U.S.C. 5121(a) in violation of 26 U.S.C. 5691(a). (The indictment appears in the Record on Appeal.) Petitioner was convicted by a jury on all counts, filed a motion for new trial, which is shown in the Record on Appeal, then after said motion was overruled after arguments by counsel, he was by the Court sentenced on each count to the custody of the Attorney General for a period of eighteen months to become eligible for parole at such time as the Board of Parolees may determine pursuant to 18 U.S.C. 4208(a)(2). The sentences were to run concurrent with each other for a total of eighteen months imprisonment.

On November 5, 1971, before the trial, defendant filed with the Clerk of the Court his motion in six grounds to quash the search warrant (which had been issued by the United States Magistrate), for the Return of Property seized thereunder and to suppress the use of the property seized as evidence and on November 9, 1971, petitioner filed with the Clerk of the Court an amendment to said motion adding grounds seven, eight and nine. The motion and the amendments to said motion are set forth in the Appendix at pages A14 and A15. The motion was heard November 11, 1971, before Honorable Wesley E. Brown and Honorable Earl E. O'Connor, Judges of the United

States District Court for the District of Kansas, who denied the motion (Appendix page A16). The affidavit and the search warrant are shown in the Record on Appeal. The motion was renewed before Honorable Earl E. O'Connor, March 30, 1972, and was again denied. At the hearing of March 30, 1972, it was stipulated by and between counsel for the government and counsel for petitioner that the testimony taken before the Magistrate at the preliminary hearing November 18, 1971, be considered by the Court in reconsidering the motions of all defendants to suppress the search warrant for return of property seized and suppress the use of the property taken as evidence. This stipulation appears at Page 25 in the Transcript of March 30, 1972, which is part of the Record on Appeal as is the Transcript of November 18, 1971, of testimony before the United States Magistrate. The denial of the motions of the three defendants to suppress the search warrant, for the return of the property seized and the use of the property seized as evidence appears as entries 28, 29 and 30 on the Court's docket sheet which is also included in the Record on Appeal, said entries are set forth on page A17 in the Appendix.

REASONS FOR ALLOWING THE WRIT

1. In the search conducted under the search warrant membership records of the Swingers Club, petitioner's check book, receipt book, invoices, paid and unpaid, memoranda, cards and other business records were seized and the papers taken over petitioner's objection. Petitioner contends that said documents constituted his personal records and were being used against him in violation of his 4th and 5th Amendment rights and were admitted in evidence against petitioner over his objection as government's Exhibits 23 through 29. Petitioner's objection and the overruling thereof by the Court and the admission of said records in evidence appear in the Trial Transcript which is part of the Record on Appeal at Pages 228 to 234.

The opinion of the Tenth Circuit Court of Appeals regarding the admission in evidence of the aforementioned seized records over the objections of the defendant is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Hill* v. *Philpott*, 445 F.2d 144, certiorari denied December 14, 1971, 404 U.S. 991, 92 S.Ct. 533. The holding of the Seventh Circuit was that Dr. Vincent R. Hill's personal books and records were and are protected by the 4th and 5th Amendments against seizure by the government and that such records should be suppressed and should not have been admitted in evidence at the trial of Dr. Hill for evasion of income taxes.

Petitioner also wishes to call the Court's attention to the numerous cases discussed by the Seventh Circuit in its opinion in *Hill* v. *Philpott*, *supra*.

2. The Court of Appeals for the Tenth Circuit was in error in stating in their opinion that the 4th and 5th

Amendments to the Constitution and the relation between the two were raised for the first time on appeal for the reason that the motion to suppress the search and seizure under the search warrant and to suppress the property seized was clearly shown in ground nine in the motion to quash and suppress the search warrant and the use of the property seized thereunder which motions were denied November 11, 1971, by Judges Wesley E. Brown and Earl E. O'Connor of the United States District Court for the District of Kansas and again denied by Honorable Earl E. O'Connor, March 30, 1972, when the motion to suppress was renewed. The opinion of the Tenth Circuit erroneously stated that the motion was heard by the United States Commission.

3. The petition for rehearing in the Tenth Circuit Court of Appeals, copies of which appear in the Appendix at page A4, clearly called the Court's attention to the erroneous statements in its opinion, but the Court of Appeals instead of correcting the erroneous statements in its opinion merely overruled the Petition for Rehearing without assigning a reason therefor. The order of the Tenth Circuit overruling the Petition for Rehearing appears in the Appendix at page A14.

4. The motion for acquittal under Rule 39 of the Rules of Civil Procedure made at the close of the government's evidence and at the close of all the evidence and renewed in defendant's motion for new trial clearly called the Court's attention to the fact that there was insufficient evidence in the record to sustain conviction of the petitioner and petitioner respectfully submits that the Court committed error in overruling his motion for new trial which appears in the Record on Appeal at pages A1-A4.

5. The Court refused to instruct on the requirements of State law governing private clubs and stating that a

violation of State law was of no concern to the jury relative to reasonable doubt. The Court instructed the jury that:

> "A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove an accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence whatsoever."

> "A reasonable doubt exists when after careful and impartial consideration of all the evidence the jurors are not satisfied beyond any reasonable chance of mistake that a defendant is guilty of the charge."

The effect of the last paragraph of this instruction in effect told the jury that a reasonable doubt existed if they were satisfied beyond a reasonable chance of mistake. This certainly modified the first paragraph in the instructions and equated reasonable doubt with chance of mistake to the prejudice of the petitioner.

The Court, in its instructions (Transcript page 440) stated that:

> "Evidence has been introduced that both clubs have been licensed as Class B Clubs under the laws of the State of Kansas whether or not the defendants or any of them violated any state law with respect to the operation of a Class B Club is not for your determination and should not enter into your consideration of the guilt or innocence of the defendants regarding the offenses with which they are charged in this case."

This instruction did not tell the jury what the defendants could do or could not do under state law and the jury may have taken the view that the proprietor of a Class B Club also should acquire a Federal liquor stamp; nor did the Court instruct the jury that an employee was exempt from the payment of the special tax stamp, and therefore, would not be criminally liable under the provisions of 26 Code of Federal Regulations, Section 194.189.

6. PEARLIS WILLIAMS, a government witness, testified that his job at the Casa Blanca Club was to check peoples' cards (Membership Cards) at the door when they came in and that he told the Grand Jury that a person had to have a card to get into the club (Transcript page 262), that when Mr. Elwood T. Davis, the Alcohol, Tobacco and Firearms Agent came to the club he did not have identification as a member; he introduced himself to Mr. Williams as a visitor from New Orleans in the construction business and Mr. Williams admitted him as a guest of the club (Transcript page 263), but nowhere in the evidence was there any mention of the fact that Mr. Williams admitted Mr. Davis as a guest of the club, communicated to petitioner, or that he had or should have knowledge thereof. There is testimony that both Mr. Davis and his fellow agent, Alfred Lee, purchased alcoholic drinks at the club but there is no testimony from the agents or any evidence that Mr. Willis knew of or was informed by anyone that the agents were not members of the club and were purchasing liquor nor is there any agreement expressed or implied between Mr. Willis or anyone else that alcoholic liquors were or would be sold to Mr. Davis, Mr. Lee or anyone else in violation of the laws of the United States.

Agent Davis testified that he asked Mr. Willis to purchase a bottle of whiskey at which time Mr. Willis stated that he didn't sell whiskey to go out as it was

against the Kansas law; that he only served whiskey for consumption on the premises (Transcript page 40). This answer shows that petitioner Willis was serving alcoholic drinks only in accordance with the Kansas law pertaining to the dispensing of liquor in private clubs. Agent Davis, over objection, was by the Court permitted to testify that he saw a barmaid use the same bottle to pour drinks for several persons (Transcript page 44). This was not a violation of the Kansas law or a Federal law for a member of a private club under the Kansas law can bring guests into the club and his liquor is used to serve the guests, therefore, more than one person may be served out of the same bottle.

On cross-examination (Transcript page 74), Agent Davis testified: "Question: Now, you never did see Jimmy Willis tending bar down at the Casa Blanca? Answer: No, sir. Question: And you are not intimating by your testimony that Jimmy Willis ever served drinks down there at the Casa Blanca, are you? Answer: No, sir." He further testified that he didn't know that Jimmy Willis ever sold drinks to anyone that wasn't a member of the club of his own knowledge (Transcript page 90), and he further testified that he never did see Jimmy Willis at the Casa Blanca Club (Transcript page 91).

Relative to drinks being served other people the agent was asked: "Question: Now, do you know with your own personal knowledge that they (drinks) were not being purchased—that they were being purchased by somebody who was buying them for a guest? Answer: Not to my own knowledge, sir, no, I don't. Question: You don't know whether or not there was some other person at another table who was buying drinks for his guests at that table out of the same bottles, is that correct? Answer: No, sir, I don't know that." (Transcript pages 118 and 119).

At the end of the cross-examination and before redirect by the government a motion was made to strike the testimony of Agent Davis as to Mr. Willis in so far as the Casa Blanca Club was concerned when the agent testified that he didn't see Mr. Willis there during the times he was there on August 27th, 28th, September 10th, 11th, 12th, 13th and October 29th and 30th and, therefore, his testimony was not competent evidence against Mr. Willis. The Court overruled an objection on this ground and stated that it would make an appropriate ruling later in the trial. The Court never did (Transcript pages 119 and 120).

Agent Davis further testified that he had conversation with a bartender named Tom relative to Jimmy Willis. He was then asked what the conversation was and it was objected to as hearsay without the hearing of Mr. Willis and would not be evidence against him. The attorney for the government stated that the witness was capable of stating what he said to the bartender; objection was again made that the witness did not place Mr. Willis there, the Court said he failed to follow the government on this. Counsel for government said he would present the other person that was there and get the other half of the conversation. The objection as to hearsay was again renewed as to the effect that the conversation was not binding upon Mr. Willis, but the Court overruled the objection and permitted the witness to testify as to what he asked Tom. The witness said he asked Tom if Willis has another place. Objection was again made that there was no foundation laid as to whether or not the witness knew that Willis owned another place; the objection was overruled. The witness testified that he had a conversation with Mr. Willis at the building housing the Swingers Club and Mr. Willis' Barbeque House. (The Swingers Club is in the North part of the building and the Barbeque House is in the

South part of the building.) The witness said he complimented Mr. Willis about how the place looked and asked him who done the work and Mr. Willis said that he and his brother had done most of the work. The witness told Mr. Willis that it was similar to a place in New Orleans and that they had conversation about the place in New Orleans where Mr. Willis had been at one time. He heard other persons compliment Mr. Willis about how nice the place was and Mr. Willis just thanked them. A motion was made that this testimony be stricken as they were talking about the building which Mr. Willis did own; the conversation was not clear as to whether it was about the Barbeque place or the Swingers Club as it was too general to bind anyone in a criminal case. The objection was overruled (Transcript pages 122 to 124).

On recross-examination Agent Davis testified that the Swingers Club was opened approximately two days before he arrived in Kansas City and that he started his investigation two days after the club opened (Transcript page 129).

JAMES GAUNCE in company with Richard Zeugin, Revenue Agents, testified that they visited the Swingers Club on September 22nd, that they informed Mr. Willis of the requirements that if he served liquor, beer or wine, he was required to have a Federal retail dealers tax stamp (Transcript page 134). Mr. Willis said he did not sell liquor or beer that he sold only set-ups and charged a cooling fee for the members' beer; that the liquor belonged to the Club members; that he did not sell any and that he knew the requirements (Transcript page 135). The agent testified that he knew what a Class B license is in Kansas and that they heard that if you owned a Federal Retail Tax Stamp that the club would have to forfeit its license (Transcript pages 138 and 139). The agents further testified that if Mr. Willis had told them that he

wanted a retail liquor dealers stamp that they would have sold it to him; that the revenue agents were soliciting every place between 6th Street and 13th Street on Quindaro; that they tried to get into other private clubs and they were closed; that they sold a stamp to two grocery stores and a dairy store across the street, these were beer stamps (Transcript page 142).

The testimony of ALFRED LEE, JR. was substantially the same as Agent Davis. He testified that on September 29th he came in and sat down with a party of other people at the bar in the Swingers Club and that they ordered drinks and they just sat and conversed and had a few drinks, then on September 30th he purchased a drink from a barmaid. The agent also testified about paying a cover charge of $2.00 for a dance that was being held at the Casa Blanca Club. He further testified that he bought a drink from a barmaid about 1:00 o'clock A.M., that he bought a drink from a barmaid at the Swingers Club when John Sanders was acting as bartender; there was no showing that Mr. Willis was present. The witness testified that he had instructions not to investigate any other clubs; that at no time after he started his investigation did he check any of the bottles at the bar to see whether they had names of the individual members of the club or identification numbers on them (Transcript page 186). He testified that he was aware of the fact that frequently members of the club had more than one bottle because they had friends who drank something else so they may have several kinds of liquor at the club (Transcript page 187).

The transcript of this trial contains 462 pages so it would be impossible to quote all or substantially all of the facts in this petition, but there is nothing in the testimony that shows that Mr. Willis had knowledge that the

two Alcohol, Tobacco and Firearms agents were not members of the club or that he had any knowledge that some of the barmaids were selling drinks and we, therefore, submit that the motion for discharge at the close of the government's evidence and at the close of all the evidence and as renewed in the motion for new trial should be sustained.

CONCLUSION

For the reasons stated in this petition it is respectfully submitted that this Court in the exercise of its supervisory power should grant a Writ of Certiorari to review the decision of the Circuit Court of Appeals, Tenth Circuit.

Respectfully submitted,

THOMAS E. JOYCE
428 Brotherhood Building
Kansas City, Kansas 66101
Attorney for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS

Before PHILLIPS, SETH, and DOYLE, Circuit Judges.

PER CURIAM.

The defendants were indicted for violations of, and conspiracy to violate, 26 U.S.C. § 5691(a). The indictment so alleged that the defendants conspired and did carry on the business of retail dealers in liquor without having paid the special federal tax to do so. The payment of the tax is evidenced by a retail liquor stamp [26 U.S.C. § 5121(a)].

The defendants were found guilty on all counts by the jury, and have taken this appeal.

The evidence relates to two establishments, the Swingers Club and the Casa Blanca Club, each licensed under Kansas state law as private clubs where only the service of the members' own liquor is permitted. The licenses so issued by Kansas are subject to revocation if the club purchases a federal retail liquor stamp. Much of the proof was directed to the interest in and participation in the ownership, operation, and management of these clubs by the defendants.

The three cases were consolidated on this appeal, and will be considered together. The errors asserted by defendants relate to the sufficiency of the evidence, instructions to the jury on reasonable doubt, and the adequacy of a search warrant.

On the authority of United States v. Reeves, 425 F. 2d 1063 (10th Cir.), this Act must be considered as a revenue measure imposed on an enterprise which can be lawfully operated. The fact that the charged federal vio-

lation may also be a violation of state law makes no difference. The evidence also shows that defendant Willis was familiar with the laws pertaining to the business, and expressly declined to purchase a federal stamp.

To raise the issues relative to the search warrants, the defendants filed written motions before trial to suppress the evidence seized. These were heard and denied by the trial court. The motions and the transcript are included in the record before us. From the transcript it appears that the defendants had at some time before the trial court hearing sought to suppress the evidence in hearings before the magistrate. The motions in the record are directed only to the reasonableness of the warrants, the affidavits, and to the search under the Fourth Amendment to the Constitution. The particular defects asserted relate to the description of the property, the grounds for issuance, the execution, and especially the details in the affidavit to support the warrant. The motion ends with the general assertion that all seizures were in violation of the Fourth Amendment and of Rule 41, Fed.R.Crim.P.

The transcript of the arguments on the motion to suppress refers only to the points above described, but also relies to a large extent on arguments advanced during prior hearings before the magistrate on motions to suppress. Under the record in this court, the only issues relating to suppression of evidence were those under the Fourth Amendment and as described above. No other attack was made on the search, nor was the attack expanded in the motions for new trial filed by defendants.

The defendants in their briefs in this court, however, argue an additional issue or ground to suppress the evidence which was not presented to the trial court. This new issue relates to Boyd v. United States, 116 U.S. 616,

Gouled v. United States, 255 U.S. 298, and generally to the relation between the Fourth and Fifth Amendments. Since this matter was raised for the first time on appeal, we will not consider it. We find no error in the disposition made by the trial court of the Fourth Amendment issues.

The defendants make a vigorous attack on the denial of their motions for acquittal. The issue centers particularly on the proof as to the defendants' proprietary interest in the two clubs.

The record shows that defendant Willis was active in the operation of both clubs. He made statements to the effect that they were his clubs, and there was testimony and evidence as to his participation in the management, purchases, and supervision of employees. He paid most of the accounts and the employees, some of whom worked at both clubs.

Defendant Ramey was active at the Casa Blanca Club; the bartender there testified that she was the manager. She also took liquor to the Swingers Club. The pay records showed she was not on a salary.

Defendant Sanders held the state license for the Swingers Club, and was bartender there from time to time. There was testimony that he referred to the Swingers Club as his on several occasions.

There was sufficient evidence to establish the conspiracy alleged, and the carrying on of the business of a retail liquor dealer as to each defendant. There was also sufficient evidence of retail liquor sales at the clubs as there was testimony of many sales by the drink at both places. The evidence was sufficient as to each defendant to submit each count to the jury, and to support

The defendants assert that the instructions as to reasonable doubt were confusing and inadequate. We have examined all the instructions and find no error.

AFFIRMED.

PETITION FOR REHEARING

Comes now the appellant, James Arthur Willis, hereinafter referred to as the defendant and petitions the Court for a rehearing in this appeal for the following reasons:

1. This Court, in its opinion, was under the impression that motions to quash the search warrant were filed before the magistrate. This is not the practice here. The complaint or affidavit for a search warrant is filed with the magistrate. The magistrate issues the warrant to the officers and after the execution of the search warrant, files the complaint or affidavit upon which the search warrant was based, the executed search warrant and the return thereto with the Clerk of the United States District Court where the subsequent proceedings such as motion to suppress are determined before the Court. Following this practice, defendant's motion to quash the search warrant was filed with the Clerk of the District Court November 5, 1971, in six grounds. The motion was amended by adding grounds 7, 8 and 9 and filed with the Clerk of the District Court November 9, 1971. The 9th ground of the motion as amended alleged that the seizure of the records under the search warrant violated defendant's constitutional rights under the 4th and 5th Amendments to the Constitution of the United States. Attested copies of the motion and the amendment thereto are filed herewith as Exhibits 1 and 2. An attested copy of the Clerk's minute

sheet of March 11, 1971, made at the hearing of the motion November 11, 1971, is filed herewith as Exhibit 3 and an attested copy of the Docket Sheet showing the Court's ruling on March 11, 1971 is filed herewith as Exhibit 4. Both the Clerk's minute sheet and the docket sheet show that the Judges overruling the motion to quash the search warrant as amended were Honorable Wesley E. Brown and Honorable Earl E. O'Connor. (Honorable Earl E. O'Connor had just been appointed and Chief Justice Brown was sitting with him for a few days.)

So there is no question but what the motion in ground 9 thereof alleged that both Fourth and Fifth Amendment rights had been violated. On page 4 of the opinion, this Court said that the transcript of the argument on the motion to suppress refers to hearings before the magistrate on motion to suppress. This hearing referred to the prior hearing before the Court and to testimony of a government agent before the magistrate but the prior hearing was before the Court and the prior motions were being renewed and were again denied by the Court.

2. The motion of James Arthur Willis for discharge filed March 2, 1972 and overruled by Honorable Earl E. O'Connor on March 30, 1972, a copy of which is in the record, calls the Court's attention to 26 U.S.C. 5121 which requires a retail dealer in liquors to pay a special tax of $54.00 a year and provides for the issuance of a stamp evidencing payment of said tax and 26 U.S.C. 6806 as amended in 1968 by P.L. 90-618, Sec. 204 reads as follows:

> "Every person engaged in any business, avocation, or employment, who is thereby made liable to a special tax (other than a special tax under subchapter B of chapter 35, under subchapter B of chapter 36, or under subtitle E) shall place and keep conspicuously in his establishment or place of business all stamps denoting payment of such special tax."

(Subchapter B of chapter 35 relates to occupational tax on wagers, 26 U.S.C. 4411 et Sequence and subchapter B of chapter 36 relates to occupational taxes on coin-operated devices, 26 U.S.C. 4461 et Sequence.)

It will be noted in the motion of James Arthur Willis for discharge filed March 2, 1972, at the bottom of page 2 and the top of page 3, defendant asserts that the display of the stamp required by 26 U.S.C. 6806 incriminates defendant in violation of the Fifth Amendment of the Constitution of the United States for the mere possession of such a stamp is prima facie evidence under Kansas Law that the alcoholic beverage laws of the State of Kansas are being violated, is cause for suspension of a private club license, and subjected defendant to a fine of $500.00 or confinement in the county jail not to exceed six months or both, and the Kansas Statute further declares that the property upon which the violation of the Kansas Alcoholic Beverage Law takes place is a public nuisance and subject to abatement as a liquor nuisance. (Laws of Kansas 1965, Chapter 316, Section 5, May 22, the same being 41-2604, Volume 3 of the 1972 Cumulative Pocket-Part Supplement to the Kansas Statutes Annotated.) The memorandum of authorities annexed to defendant's motion for discharge called the Court's attention to:

Leary vs. United States, 395 U.S. 6, 88 Sup.Ct. 697

Marchetti vs. United States, 390 U.S. 39, 19 L.Ed.2d 889

Grosso vs. United States, 390 U.S. 62, 88 Sup.Ct. 709, 19 L.Ed.2d 906

United States vs. Coin and Currency, 401 U.S. 715, 91 Sup.Ct. 1041

and the Constitution of the United States, particularly the Fifth Amendment thereto. (Last page of Motion for Discharge.)

The Government, in its suggestions in opposition to defendant's motions contends that in Marchetti, Gross, Haynes (88 S.C. 722) and Leary that the activities were permeated with criminal statutes. In the case now before the Court, the Kansas law is permeated with criminal statutes for the possession of the special tax stamp for the sale of liquor is prima facie evidence that the person holding such stamp is selling intoxicating liquors in violation of Kansas law and as 26 U.S.C. 6806 requires conspicuous posting of the stamp in defendant's place of business where any police officer or inspector of private clubs could see the same, would incriminate the defendant and subject him to a fine or jail sentence of not to exceed six months or both fine and imprisonment, cancel his license, and cause the premises to be abated as a nuisance.

3. In the Court's opinion at page 3, it is stated on the authority of United States vs. Reeves, 425 F.2d 1063 (10th Cir.) that the stamp act is a revenue measure imposed on an enterprise which can be lawfully operated. The business of sale of liquor by the drink in Kansas, and several other states, can not be lawfully operated. In other words, it is outlawed by Kansas law. Therefore, it is unrealistic to say that such business can be lawfully operated in Kansas for such is not a fact.

4. The testimony of Internal Revenue Officer James Gaunce to the effect that Mr. Willis told him that John Sanders was the owner of the Swingers Club (Transcript 133) and that Mr. Willis was manager and that he did not sell any liquor or beer (only sold setups and charged a cooling fee for the members' beer) shows that he intended to abide by the Kansas law pertaining to private clubs and therefore did not desire a federal liquor stamp, the ownership of which would subject him to a fine or jail sentence, or both, plus forfeiture of the club's license and abatement of the club as a nuisance. At the trial, the

lease from Willis to Sanders of the north one-half of the building in which Mr. Willis operated the Bar-B-Q-House was introduced as defendant's Exhibit A, a copy of which lease is filed herewith.

5. There is no evidence in the record to show an agreement between Willis, Sanders, and/or Ramey, expressed or implied, to violate federal law by the operation of a business selling liquor by the drink without the purchase of a Federal Liquor Retail Dealer's Stamp.

Relative to the evidence necessary to constitute a conspiracy, this Court, in Glover vs. United States, 306 F.2d 594 at l.c. 595, said:

> "(1) To render evidence of the acts or declarations of an alleged conspirator admissible against an alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established by independent evidence. The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators, done or made in his absence.
>
> (2, 3) While the evidence may have been sufficient to cast suspicion upon Glover, that was not enough. Evidence which creates a mere suspicion of guilt is not enough. Guilt may not be inferred from mere association.
>
> (4) We conclude that the evidence, viewed in the light most favorable to the Government, was not sufficient to support a verdict of guilty on Counts One, Five and Six."

6. In the Court's opinion at page 5, it is stated that defendant Ramey took liquor to the Swingers Club. Pearlis Williams, sometimes referred to as P.C., a Gov-

ernment witness, testified that he was hired by Ernestine Parker who held the licenses, State and City, for the Casa Blanca Club, that it was his job to check to see that all persons entering the club had membership cards and that Agent Davis, when he first came to the club, told him that he, Mr. Davis, was in Kansas City on business from New Orleans, that he was engaged in construction and at the end of their conversation, Mr. Williams admitted Mr. Davis as a guest of the club.

Relative to defendant Ramey, Mr. Williams stated that he traveled from the Casa Blanca Club to the Swingers Club in his car and that the lady (Mrs. Ramey) traveled in hers (TP 250).

Question: "What kind of car was she in?

Answer: Eldorado.

Question: Whose car was that?

Answer: I couldn't say. I suppose Mr. Willis' (TP 250).

When asked if she took anything with her, his answer was "Two bottles".

Question: And she took two bottles of what?

Answer: Rum, I imagine.

Question: What kind of bottles were they?

Answer: It was a white liquid in the bottles, I couldn't say to be exact (TP 251 and 252).

Question: The two bottles that she had, were they open or were they sealed?

Answer: Sealed, I think, if I am not mistaken (TP 252).

Question: Were those bottles hers? Or do you know?

Answer: I wouldn't know, Sir (TP 253).

Question: Do you know what she did with the two bottles that she had?

Answer: No, Sir, I don't (TP 253-254).

From the foregoing answers which are speculation and conclusions of the witness, it certainly was not established that Sarah Ramey took liquor from the Casa Blanca Club to the Swingers Club for use in the business of selling liquor by the drink for the witness did not testify that there was liquor in the bottles. The only conclusion that can be reached from his answers was that he did not know what was in the bottles.

Elwood T. Davis, an Alcohol, Tobacco and Firearms Division Agent, testified that he attempted to purchase a bottle of liquor from Mr. Willis and Mr. Willis told him that he did not sell whiskey to go as it was against the Kansas law and that he only served whiskey for consumption on the premises (TP 40). This testimony of Mr. Davis corroborates the statement of Mr. Gaunce, the Revenue Agent, of Mr. Willis' intention to obey Kansas law for you will note that Mr. Willis used the word "served" whiskey for consumption on the premises and did not say that he "sold" whiskey for consumption on the premises. The agent, when asked whether he would know that a man across the room from him or in a booth next to him who placed an order with a cocktail waitress was a member of the club or not, answered, "I wouldn't know that, Sir." He further testified that he never saw Mr. Willis tending bar at the Casa Blanca or that Mr. Willis ever served drinks at the Casa Blanca (TP 74). When asked on cross-examination whether or not Jimmy Willis ever sold a drink to anyone that was not a member of the club, his answer was: "No Sir" and he further stated that the only other person he knew of who was served a drink who was not a member of the club was his fellow agent, Alfred Lee, Jr.,

and that he wouldn't know, of his own knowledge, whether other people served were or were not members of the club. He further stated that he never saw Jimmy Willis at the Casa Blanca Club (TP 90-91). He further testified that on October 29, he saw Sarah Ramey coming into the Swingers Club with a bottle which he believed, but did not know, to contain spirits (TP 93). He was also asked if at the preliminary hearing he didn't state that Pearlis Williams (P.C.) was at or near the door on all occasions and that he understood his job was to check people when they came in the door (for membership cards) and his answer was: "Right, Sir, right." Alfred Lee, an investigator with the Alcohol, Tobacco and Firearms Division, testified that he made several purchases of liquor from cocktail waitresses but there is nothing in his testimony that indicates that Mr. Willis, Mr. Sanders or Mrs. Ramey had any knowledge thereof. In this respect, Agent Davis' testimony is to the same effect. He testified that Sarah Ramey, on October 1, was working as barmaid, serving drinks to other patrons but there is nothing in the record to show whether or not they were members of the club. He did testify that he saw Mr. Willis fix a drink but there is nothing to show whether or not it was for, or not for, a member of the club. The same is true as to the time he saw Sarah Ramey acting as barmaid. Mr. Lee testified that Sarah Ramey and Pearlis Williams came into the Swingers Club, Sarah Ramey carrying a bottle of clear liquid and that Mr. Williams carried two such bottles (TP 170-171), that Sarah Ramey placed the bottle she was carrying behind the bar on a tray and that Mr. Williams placed the bottles he had at the end of the bar. Nothing further was said as to what happened to the bottles. In other words, there is no evidence that any of the contents thereof was sold if the bottles contained liquor (TP 170 and 171). Agent Lee, at TP 176, was asked on cross-

examination, "You wouldn't know what the contents of the bottles were?"

Answer: "No, Sir, I wouldn't."

When asked if it was sugar water in the bottles, his answer was, "No, Sir, I don't know." He was then asked, "You wouldn't have any idea what was in it?" His answer was, "No, Sir, I don't." He further answered that there was a fluid like water in the bottles.

Question: "But you don't know what was in them?"

Answer: "No Sir, I don't." (Lines 116 and 117, TP 176 and 177).

7. From the foregoing quotations from the evidence and from the evidence as a whole, it is the contention of the defendant that the Court erred in overruling the motion of defendants for discharge and acquittal at the close of the evidence. To make further argument on this subject would be repetition of the arguments in the brief of defendant Willis at pages 73 to 81 plus the argument made from page 82 to 87 of the brief.

8. The Court's instruction on reasonable doubt was as follows:

> "A reasonable doubt may arise not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove an accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The Law does not impose upon a defendant the duty of producing any evidence whatsoever.

> A reasonable doubt exists when after careful and impartial consideration of all the evidence the jurors are not satisfied beyond any reasonable chance of mistake that a defendant is guilty of the charge."

Objection to this instruction is made to the addition of the last paragraph which told the jurors inferentially that if they were not satisfied beyond any reasonable chance of mistake that defendant is guilty of the charge constituted a reasonable doubt. This paragraph, defendant contends, is inconsistent with reasonable doubt as defined in the first paragraph of the instructions for it creates doubts in the minds of the jurors and equates chance of mistake as being the sole criteria of reasonable doubt for this instruction is certainly a departure from the time-honored instruction on reasonable doubt in the Federal Court to the effect that:

> "A reasonable doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you would be willing to rely and act upon in the most important of your own affairs. A defendant is not to be convicted on mere suspicion or conjecture."

and the writer of this brief feels that the instruction as given by the Court on reasonable doubt was prejudicial and that instead of experimenting with various instructions on the subject to see whether or not this Court of Appeals will approve or disapprove the same that the instructions should be standardized.

CONCLUSION

For the foregoing reasons, defendant James Arthur Willis submits that this petition for rehearing should be

granted and the opinion of this Court heretofore rendered herein be vacated and set aside and the case set down for re-argument and that the parties be permitted to file supplements to the briefs now on file.

Respectfully submitted

/s/ Thomas E. Joyce
Attorney for defendant

MAY TERM—JUNE 14, 1973

Before Honorable Orie L. Phillips, Honorable Oliver Seth, and Honorable William E. Doyle, Circuit Judges

This matter comes on for consideration of the Petition for Rehearing and Exhibits filed in support of Petition for Rehearing submitted by the Appellants in the captioned case.

Upon consideration whereof, the Petition for Rehearing is denied.

/s/ Howard K. Phillips
Clerk

MOTION TO QUASH SEARCH WARRANT: FOR THE RETURN OF PROPERTY SEIZED THEREUNDER: AND TO SUPPRESS ITS USE AS EVIDENCE

(Filed November 5, 1971)

Comes now James Arthur Willis by Thomas E. Joyce, his attorney, and respectfully moves the court for an order quashing the search warrant issued by the magistrate in the above entitled proceeding; for the return of property seized under said search warrant; and suppress for use as evidence any and all property taken in the search under said search warrant, for the following reasons:

1. The affidavit upon which the search warrant was issued did not establish probable cause for the issuance of the search warrant.

2. The search warrant was insufficient on its face.

3. The search warrant in the above entitled proceeding constituted a general search warrant as to the property seized thereunder.

4. The search warrant failed to describe the property to be seized thereunder.

5. The property seized is not definitely or accurately described in the affidavit for or in the search warrant.

6. The money taken from the cash register in the "Bar-B-Q House" was unlawfully seized in the search.

/s/ Thomas E. Joyce
428 Brotherhood Bldg.
Kansas City, Kansas 66101

AMENDMENT TO MOTION TO QUASH SEARCH WARRANT; FOR THE RETURN OF PROPERTY SEIZED THEREUNDER; AND TO SUPPRESS ITS USE AS EVIDENCE

(Filed November 9, 1971)

The motion of James Arthur Willis filed herein on the 5th day of November, 1971 to Quash Search Warrant; for the return of property seized thereunder; and to suppress its use as evidence, is hereby amended by the addition of the following grounds:

7. The money taken from the cash register in the Swingers Club was unlawfully seized in the search.

8. The two cash registers taken in the search from the Casa Blanca Club were unlawfully seized in the search.

9. The seizure of defendants' books of account, records pertaining to movants place of business, check book, federal and state tax data and returns, and other business records including licenses to conduct the Bar-B-Q House, Swingers Club and Casa Blanca Club violated movants constitutional rights under the fourth and fifth amendments to the Constitution of the United States of America. That by reason of the seizure of records from which movant calculates his tax liability to the state and federal government he cannot file the required returns unless the same are returned to him and will incur penalties for the reason that the returns are not filed.

/s/ Thomas E. Joyce
Attorney for James Arthur Willis

DOCKET ENTRY OF NOV. 11, 1971 DENYING MOTION TO QUASH SEARCH WARRANT, FOR THE RETURN OF PROPERTY SEIZED, AND TO SUPPRESS ITS USE AS EVIDENCE

November 11th, 1971
Judge: Brown & O'Connor

Motion of deft. to quash search warrant; for return of property seized thereunder; and to suppress its use as evidence.—DENIED

DOCKET ENTRY OF MARCH 30, 1972 DENYING MOTIONS OF DEFENDANT JAMES ARTHUR WILLIS

Motion to discharge—Denied; Motion for discovery and inspection—Granted in that deft. may inspect seized objects; Motion for severance—Denied without prejudice; Motion to dismiss indictment—Denied; Motion to suppress evidence—Denied; for bill of particulars—Denied; for Grand Jury testimony denied as to Deft. Willis, none taken, U. S. to furnish Rule 3500 material evening before testimony; in camera inspection as to witnesses in question; U. S. to furnish prior conviction records of witnesses at time witness called; all favorable evidence to be furnished; Lab reports to be furnished within ten days.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-102

JAMES ARTHUR WILLIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner principally contends that the evidence against him was insufficient; that the requirement that a retail liquor dealer pay a special federal tax violates the privilege against self-incrimination; and that his privilege against self-incrimination was violated by the admission into evidence of business records seized incident to a warrant search.

After a jury trial in the United States District Court for the District of Kansas, petitioner and his two co-defendants, Sarah Ramey and John Sanders, were convicted on three counts of conspiracy in violation of 18 U.S.C. 371 and substantive violations of 26 U.S.C. 5691(a) for willful non-payment of the special tax imposed on retail dealers in liquor by 26 U.S.C. 5121(a). Petitioner was sentenced to concurrent prison terms of eighteen months on each count subject to early parole eligibility

under 18 U.S.C. 4208(a)(2).[1] The court of appeals affirmed in a *per curiam* opinion (Pet. App. A1-A4).

The evidence at trial showed that in the summer and fall of 1971 petitioner and his co-defendants conducted retail operations selling liquor by the drink at the Swingers Club and the Casa Blanca Club, two ostensibly private clubs in Kansas City, Kansas.[2] The Swingers Club, which had an adjacent restaurant owned by petitioner, known as the Bar-B-Q House, was licensed as a private club in Sanders' name. Petitioner, a Missouri resident, was ineligible to obtain a private club license under Kansas law (Vol. I, 66-67, 330;[3] Kan. Stat. Annot. 41-2623). Nevertheless, he was the principal operator of both clubs. Petitioner operated the Casa Blanca Club during the summer and fall of 1971 and gave all the orders to employees (Vol. I, 237-239, 255-256). On September 22, 1971, he admitted to two Internal Revenue Service agents that he was the manager of the Casa Blanca (Vol. I, 132-134, 206-208). On September 28, 1971, he referred to the Casa Blanca as his "other club" in a conversation with an undercover agent at the

---

[1] Ramey and Sanders received suspended concurrent terms of a year and a day on each count and were placed on probation for two years.

[2] Under Kansas state law, the sale of liquor by the drink is prohibited (Kan. Const. Art. 15, Sect. 10; Kan. Stat. Ann. 41-803). Class B private clubs which provide set-ups for members who bring their own liquor are permitted, but these clubs may not purchase liquor for their members or keep liquor which is not marked with a member's name (Kan. Stat. Ann. 41-2601 and 41-2602). No person holding a class B license may receive a second license (Kan. Stat. Ann. 41-2646). Class B licenses are subject to revocation if the licensee club purchases a federal retail liquor stamp (Kan. Stat. Ann. 41-2611(f)).

[3] References are to the five-volume Record in the court of appeals.

Swingers Club (Vol. I, 151-152, 181). He served as a bartender at the Casa Blanca on at least one occasion (Vol. I, 273, 162-165). Several times he ordered whiskey by telephone from a local liquor store, gave a Casa Blanca employee money (as much as $200) to pay for it, and then sent the man to pick the whiskey up and bring it to the Casa Blanca's Bar (Vol. I, 240-243).

Petitioner also managed the Swingers Club (Vol. I, 243) and served as the bartender there on at least four occasions (Vol. I, 31-33, 38-39, 45-50). On September 22, 1971, he admitted to two Internal Revenue agents that he managed the Swingers Club (Vol. I, 132-134, 206-208). On September 30, 1971, he gave two women at the Casa Blanca Club directions to "his other club," the Swingers. In the same conversation, an associate of petitioner told the women in petitioner's presence that petitioner was the proprietor of the Swingers Club (Vol. I, 158-159). On August 28, 1971, he accepted compliments from customers who commented on how nice the newly-opened Swingers Club looked. He also told an undercover agent that he and his brother had done the work in fixing up the Swingers Club (Vol. I, 123-124). The Club was connected to petitioner's Bar-B-Q House by a swinging door and food from the Bar-B-Q House was served to Club patrons (Vol. I, 52-53, 32-33, 49-50, 58-60). On one occasion petitioner brought two bottles of vodka to the Swingers Club and on another occasion he took his keys and left to obtain more scotch (Vol. I, 50-51, 152-153). In late August 1971 he purchased $1,100 worth of liquor from a local retailer, allegedly for a grand opening party for his barbecue restaurant (Vol. I, 304-307).

Petitioner signed the checks, paid the bills, and paid employees of both the Casa Blanca and the Swingers

Club (Vol. I, 321-330, 230-233, 244, 255-256, 268-269). Several of these employees worked at both clubs, depending upon where they were most needed (Vol. I, 25, 32-33, 146-148, 153-154, 161-165, 195, 245, 281-283).

On nine separate occasions in August, September, and October of 1971, undercover agents of the Alcohol, Tobacco and Firearms Division of the United States Treasury Department purchased alcoholic mixed drinks at the Casa Blanca Club and the Swingers Club, both of which were being operated as regular bars serving liquor by the drink to customers (Vol. I, 23-65, 146-173). The agents testified that petitioner was frequently present when drinks were being sold and that on occasion he tended bar.

On September 22, 1971, two Internal Revenue agents entered the Swingers Club and asked to see the manager. They were informed by petitioner that he was the manager of the Club and that John Sanders was the owner. Petitioner also advised them that he managed the Casa Blanca Club. The agents informed petitioner that if liquor was being sold by either club, a federal retail liquor dealer tax stamp had to be purchased for that club. Petitioner replied that liquor was not being sold at either place and that he knew the federal tax requirements (Vol. I, 132-135, 206-209, 213-215, 220-221).

It was stipulated that no federal liquor tax stamp was purchased for either club for the period covered by the indictment (Vol. I, 321).

On Saturday, October 30, 1971, federal agents raided the Casa Blanca Club and the Swingers Club pursuant to search warrants obtained that morning from the local United States Magistrate. Among the items seized in the two searches were numerous bottles of liquor, bar equipment, various mixes, cash and file boxes, and

certain business records such as check books, receipts, bills, and time cards. Records for the Casa Blanca Club were seized at the Swingers Club (Vol. I, 329-330).

1. The evidence was more than ample to support the jury's verdict. It established that liquor was sold at both clubs; that petitioner was the principal operator of both clubs and paid and directed the employees; that petitioner purchased liquor which was brought to the Casa Blanca Club; and that petitioner was frequently present when drinks were being sold, occasionally tending bar.[4]

2. The requirement that dealers in liquor must pay a special federal tax (26 U.S.C. 5121(a), 5691(a)) does not violate the privilege against self-incrimination, notwithstanding that Kansas state law prohibits the sale of liquor by the drink.[5] The courts have consistently rejected the self-incrimination defense in prosecutions for violation of the federal liquor tax laws. See *United*

---

[4] Petitioner's challenge to the jury instructions (Pet. 8-10) is without merit. State law concerning private clubs had no bearing on whether the federal violations had occurred. The trial court gave a thorough explanation of "reasonable doubt" (Vol. I, 425-426), referring to it in traditional terms. See *Holland* v. *United States*, 348 U.S. 121, 140. The jury was properly told that it should convict only if convinced beyond any reasonable chance of mistake that the defendant was guilty. It was also told that before it could convict, it had to find that the defendant was a proprietor of the liquor retail business or one who knowingly aided and abetted evasion of the tax other than in the capacity of an employee of the proprietor (Vol. I, 435-436).

[5] Petitioner's self-incrimination argument principally relies on the requirement that the liquor tax stamp be conspicuously displayed in the place of business (26 U.S.C. 6806) (Pet. 3). This statute is not in issue here. Petitioner was convicted for failure to pay the tax (26 U.S.C. 5121(a), 5691(a)), not for failure to display the stamp.

States v. *Curry*, 428 F. 2d 785 (C.A. 9); *United States* v. *Hunt*, 419 F. 2d 1 (C.A. 3), certiorari denied, 397 U.S. 1016; *United States* v. *Walden*, 411 F. 2d 1109 (C.A. 4), certiorari denied, 396 U.S. 931; *Wilson* v. *United States*, 409 F. 2d 604 (C.A. 5), certiorari denied, 395 U.S. 923.

The federal tax statute in question is a legitimate revenue measure directed at a lawful industry operating on a national scale. Unlike the marijuana or gambling taxes, liquor taxation is not directed to a "selective group inherently suspect of criminal activities," but is rather "an essentially non-criminal and regulatory area of inquiry." See *Leary* v. *United States*, 395 U.S. 6, 16-18; *Marchetti* v. *United States*, 390 U.S. 39, 57; *Grosso* v. *United States*, 390 U.S. 62, 64; *Haynes* v. *United States*, 390 U.S. 85, 98-99. The enforcement of a legitimate federal revenue measure cannot be undercut because an individual may desire to operate in contravention of some state law.

3. Petitioner contends that the business records seized pursuant to a valid search warrant and introduced into evidence violated his privilege against self-incrimination (Pet. 7). The court of appeals did not consider this contention because it had not been properly raised below (Pet. A2-3).

In any event, the contention is without merit. The materials seized consisted of business records such as check books, receipts, bills, and time cards. These records of an illegal liquor business are physical non-testimonial evidence to which the Fifth Amendment privilege does not apply. See *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8) (records of illegal gambling business), certiorari denied, 402 U.S. 952. As this Court has noted: "A 'book' which is no more

than a ledger of an unlawful enterprise * * * might stand on a quite different constitutional footing from the books * * * [that reflect thoughts, opinions, beliefs, or mere predilections of their possessors]." *Stanford* v. *Texas*, 379 U.S. 476, 485, n. 16.

Petitioner relies on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. In *Hill*, thirty-five cartons containing a physician's private books, papers and records, including the medical records of his patients, were seized on the basis of a valid search warrant issued pursuant to an investigation for tax evasion. *Hill* rejected the long-recognized distinction between records sought by subpoena and records sought by search warrant. But the difference is critical: the search warrant does not compel the actual or potential defendant to produce documents and identify them as those described in the subpoena. *United States* v. *Blank*, 459 F. 2d 383, 385 (C.A. 6), certiorari denied, 409 U.S. 887. As Mr. Justice Holmes wrote: "A party is privileged from producing the evidence but not from its production." *Johnson* v. *United States*, 228 U.S. 457, 458. Only last Term, this Court reaffirmed this statement and the principle that the privilege against self-incrimination only extends to coercion exerted directly on the accused in order to force him to produce incriminating documents. *Couch* v. *United States*, 409 U.S. 322, 328-329. When non-testimonial evidence is seized pursuant to a valid search warrant the privilege is not violated.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General

SEPTEMBER 1973.

[illegible]-1973-09